

AMENDMENT UNDER 37 C.F.R. § 1.111
U.S. Appln. No. 09/846,394

REMARKS

Review and reconsideration on the merits are requested.

With respect to the rejection of claims 11-14 under 35 U.S.C. § 112, second paragraph, the Examiner's suggestion of "non-carbonated...drink" is adopted.

Withdrawal is requested.

Prior art considered: U.S. Patent 4,960,602 Talkington et al (Talkington); U.S. Patent 6,458,395 Emoto (Emoto); U.S. Patent 5,914,149 Tomida (Tomida).

The rejection: claims 1, 3, 5, 7, 9, 11 and 13 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Talkington in view of Emoto and Tomida.

The Examiner's position on the prior art is set forth in the Action and will not be repeated here except as necessary to an understanding of Applicants' traversal which is now presented.

Talkington et al discloses a composition which comprises a sucrose fatty acid ester and a flavor for foods and beverages. The Examiner is correct in that the HLB of the sucrose fatty acid ester is specified in this reference, the sucrose fatty acid ester and a lysolecithin are used in combination in this reference, and that this reference does not disclose an acidic beverage. However, Applicants respectfully submit that one of ordinary skill in the art would not be led to combine Talkington and Emoto, for the reasons now presented.

Emoto relates to a gelatinous food product comprising a saccharide, a lipid, a protein, an organic acid, an organic acid salt, an emulsifying agent, a gelling agent, and other additives, which is clearly different from a liquid product as in the present invention. Emoto does not teach or suggest any liquid product. Although the Examiner states that little patentable distinction is seen between a gelled food product and a drink, as gels are liquid before they become gels,

AMENDMENT UNDER 37 C.F.R. § 1.111
U.S. Appln. No. 09/846,394

Applicants submit that it is well known to one of ordinary skill in the art that the behavior of substances in a composition is greatly influenced by the difference as to whether the composition is in the state of a solid (such as a gel) or in the state of a liquid.

The Examiner states at page 3, line 5 of the Action that “the reference (speaking of Emoto) does solve the problem of making a clear food composition, at a low pH”. However, Emoto does not disclose or even suggest any transparency (clear food composition). Moreover, although the Examiner states that the composition can be clear when gelatin is used, Emoto does not teach or suggest gelatin having any “transparency” effect. Even assuming that Emoto discloses gelatin as a protein, it is a well known fact that gelatin is a gelling agent and a gelatinous product (composition) obtained using gelatin as a gelling agent is not necessarily transparent even though gelatin is transparent. The present invention does not positively require gelatin as an essential component.

The low pH (pH 3.3 to 4) disclosed in Emoto is at the isoelectric point of the protein which is for gelling the protein (Abstract, col. 4, lines 44-46, col. 6, lines 38-39). However, the above disclosure regarding the isoelectric point of the protein in Emoto in no fashion relates to “transparency” and, further, “transparent” is nowhere mentioned in Emoto.

In more detail, Emoto does not teach or suggest the use of a sucrose fatty acid ester or a lecithin to achieve the transparent state of a composition having a low pH (3.3 to 4). Further, Emoto does not teach or suggest a transparent composition having a low pH of 3.3 to 4. Thus, the composition disclosed in Emoto is clearly distinguished from the composition of the present

AMENDMENT UNDER 37 C.F.R. § 1.111
U.S. Appln. No. 09/846,394

invention and even if the use of the sucrose fatty acid ester or a lecithin is disclosed, Emoto and the present invention are, simply stated, completely different from each other.

Considering the above, Applicants respectfully submit that there is no motivation for one of ordinary skill in the art to combine Talkington and Emoto to reach a stable, acidic and transparent drink as claimed in the present application.

However, the Examiner further relies upon Tomida, and Applicants now turn to Tomida.

Although Tomida may disclose the use of a sucrose fatty acid ester or a lecithin in a transparent liquid food such as a tea drink, Tomida does not disclose the HLB of a sucrose fatty acid ester. Although the Examiner admits that the HLB of a sucrose fatty acid ester is not disclosed, it seems that the Examiner is considering that the HLB is taught because the Tomida composition is transparent.

This is incorrect. The HLB value of a sucrose fatty acid ester is not simply decided by the fact that a composition is transparent. It is well known to one skilled in the art that the transparency of a composition is influenced in a complex manner by various factors such as the types and amounts of sucrose fatty acid ester and a lysolecithin, as well as the acidity of the composition containing the same. Thus, the present invention is characterized by a specific HLB range. In addition, the pH of Tomida appears to be pH 4.5 or higher (cf. col. 4, lines 9-13), which is quite different from the pH range of the present invention.

Applicants respectfully submit that it is quite clear from the above discussion of the prior art that the Examiner has relied upon that there is no motivation, except the teaching in the present specification, for one of ordinary skill in the art to combine Talkington with Emoto and

AMENDMENT UNDER 37 C.F.R. § 1.111
U.S. Appln. No. 09/846,394

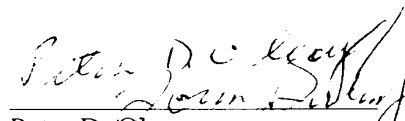
Tomida. Further, even assuming that the references could or would be combined, the combined teaching of the prior art, Applicants submit, does not reasonably disclose or suggest all of the precise elements of the present invention as claimed.

In short, the prior art is combined only upon a "hindsight" reading in light of the present specification and Applicants submit that claim 1 is unobvious over the references relied upon. As a consequence, the remaining claims rejected are also submitted to be patentable over the prior art.

Withdrawal of all rejections and allowance is requested.

The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,


Peter D. Olexy
Registration No. 24,513

SUGHRUE MION, PLLC
Telephone: (202) 293-7060
Facsimile: (202) 293-7860

WASHINGTON OFFICE



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PATENT TRADEMARK OFFICE

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AMENDMENT UNDER 37 C.F.R. § 1.111
U.S. Appln. No. 09/846,394

APPENDIX
VERSION WITH MARKINGS TO SHOW CHANGES MADE

IN THE CLAIMS:

The claims are amended as follows:

11. (Amended) The stable, acidic and transparent drink as claimed in claim 1, which is an acidic [carbonate-free] non-carbonated transparent drink.

12. (Amended) The stable, acidic and transparent drink as claimed in claim 2, which is an acidic [carbonate-free] non-carbonated transparent drink.

13. (Amended) The stable, acidic and transparent drink as claimed in claim 5, which is an acidic [carbonate-free] non-carbonated transparent drink.

14. (Amended) The stable, acidic and transparent drink as claimed in claim 6, which is an acidic [carbonate-free] non-carbonated transparent drink.